COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own Motion as to the propriety of the rates and charges set forth in M.D.T.E No. 17, filed with the Department on May 5, 2000 and June 14, 2000 to become effective October 2, 2000 by New England Telephone and Telegraph Company d/b/a Bell Atlantic – Massachusetts	)	**D.T.E. 98-57, Phase III**

COMMENTS OF VERIZON MASSACHUSETTS

On June 10, 2002, the Hearing Officer issued a memorandum which suspended the procedural schedule and requested that parties comment on four questions relating to the future course of this proceeding in light of the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit in *U.S. Telecom Ass'n v. FCC*, 290 F.3d 415 (2002).[1] As discussed below, the Department should take no further action in this case until the Federal Communications Commission ("FCC") responds to the D.C. Circuit's remand and the FCC completes its inquiry in other pending dockets concerning the unbundling of advanced services.

[1] On the same day as the Procedural Memorandum was issued, AT&T filed a Motion for Extension of Time to File Testimony. AT&T's motion requested a one-month extension for parties to file testimony under the schedule in effect prior to the Hearing Officer's stay of further proceedings. AT&T stated that an extension was necessary in part because it would be exploring through further extensive discovery and testimony issues relating to the network architecture of Verizon MA's first office application of a DSL Access Service at the Remote Terminal announced in February 2002. AT&T Motion, at 2-3. Specifically, AT&T contended that Verizon MA's deployment would limit the packetizing of the loop signal to data transmission, and it would argue that the Department should require Verizon MA to alter its planned deployment to enable the packetizing of the entire loop signal, including voice signals. *Id.* Given the suspension of the procedural schedule, Verizon MA has not responded to AT&T's suggestion of a need for a broad inquiry and reserves it right to do so if the Department decides to proceed with this case.

I. INTRODUCTION

In its *UNE Remand Order*, at ¶ 306,[2] the FCC concluded that "given the nascent nature of the advanced services marketplace, we will not order unbundling of the packet switching functionality as a general matter." The FCC recognized: (i) there was significant competition for advanced services in the market; (ii) equipment needed to provide advanced services (such as DSLAMS and packet switches) are readily available on the open market; (iii) mandatory unbundling may retard investment and innovation by ILECs in new advanced services technologies; and (iv) regulatory action could "stifle competition in the advanced services market." *Id*., ¶¶ 307-308, 314-316. Consistent with these findings, the FCC declined to unbundle packet switching, except when certain specific conditions set forth in 47 CFR § 51.319(c) (3)(B) were satisfied.[3]

The Department found in the initial stage of this case that Verizon MA does not have the legal obligation to provide unbundled packet switching at this time unless the FCC conditions set forth in 47 CFR § 51.319(c) (3)(B) were satisfied or the FCC modified its rules. *Phase III Order*, at 88. The

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2 *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 CC Docket No. 96-98, 15 FCC Rcd. 3696 (1999).*

3 Those conditions are:

> (i) The incumbent LEC has deployed digital loop carrier systems, including but not limited to, integrated digital loop carrier or universal digital loop carrier systems; or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section *(e.g.*, end office to remote terminal, pedestal or environmentally controlled vault);
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> (ii) There are no spare copper loops capable of supporting the xDSL services the requesting carrier seeks to offer;
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> (iii) The incumbent LEC has not permitted a requesting carrier to deploy a Digital Subscriber Line Access Multiplexer at the remote terminal, pedestal or environmentally controlled vault or other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined by § 51.319(b); and
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> (iv) The incumbent LEC has deployed packet switching capability for its own use.

Department nevertheless required that the Company file an illustrative tariff providing for a form of unbundling – Covad's so-called "plug and play" option – so that it could further consider the legal, technical, and operational issues associated with packet switching unbundling. *Id.*, at 88-89. The Department felt that addressing these issues now would eliminate any head-start Verizon MA might enjoy if it deployed a packet switching infrastructure (*i.e.*, placed its DSL equipment in a remote terminal) to offer retail services in the future and unbundling was otherwise required under the FCC's conditions. *Id.*

Verizon MA filed its "Packet at the Remote Terminal Service ("PARTS") illustrative tariff in March 2001. The tariff outlined a wholesale service that would provide CLECs with a transport service between a demarcation point at the end user's premises and a CLEC's specified termination at the CLEC's collocation arrangement in the end user's serving wire center. In addition, as directed by the Department, the illustrative tariff contained terms for CLEC-provided line cards at remote terminals (*i.e.*, "plug and play").

This case has dealt with the legal, technical, and operational issues associated with that illustrative tariff. The Department is well aware of the parties' arguments developed in testimony and briefs, and Verizon MA will not repeat its positions here. Suffice it to say, that since the outset of this case, the Department has consistently looked to the FCC's rules and requirements as the guiding principles, as it must. The D.C. Circuit's *U.S. Telecom* decision obviously bears on the efficacy of the FCC's unbundling requirements, and the Hearing Officer properly suspended further proceedings to receive the comments of the parties. In the following section, Verizon MA responds to the four questions posed by the Hearing Officer.

II. DISCUSSION

1. What is the effect of the D.C. Circuit Court's ruling in *U.S. Telecom Ass'n v. FCC* on this proceeding?

The D.C. Circuit's *U.S. Telecom* decision remanded the FCC's *UNE Remand Order*, and vacated and remanded the *Line Sharing Order*[4]. The D.C. Circuit found the FCC's rules in the *UNE Remand Order* overly broad because they require national unbundling without consideration of the different levels of competition or impairments in different geographic markets, including the impact of regulatory pricing and cross-subsidization within ILEC services. 290 F.3d at 5-10. Of particular relevance to this proceeding, the Court specifically rejected the FCC's unbundling of packet switching:

> Because the Commission's concept of "impairing" cost disparities is so broad and unrooted in any analysis of the competing values at stake in implementation of the Act, we cannot uphold even the two non-universal mandates adopted by the Commission (for circuit switches and packet switches).

Id., at 10.

Also of relevance is the basis for the Court's rejection of the FCC's *Line Sharing Order*. The Court held that the FCC "failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite)." *Id.*, at 10. The D.C. Circuit found unreasonable the FCC's interpretation of Section 251(d)(2)(B)'s instruction that it consider whether "failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services *that it seeks to offer*" to require consideration only of services provided over an ILEC's network:

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[4] *Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,14 FCC Rcd 20,912 (1999)*

> As Justice Breyer's separate opinion [in *Iowa Utilities Board v. FCC*] carefully explained, mandatory unbundling comes at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource. And, as we said before, the Court's opinion in *Iowa Utilities Board*, though less explicit than Justice Breyer on the need for balance, plainly recognized that unbundling is not an unqualified good – thus its observation that the Commission must "apply *some* limiting standard, rationally related to the goals of the Act," and its point that the Commission "cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network." In sum, nothing in the Act appears a license to the Commission to inflict on the economy the sort of costs noted by Justice Breyer under conditions where it had no reason to think doing so would bring on a significant enhancement of competition. The Commission's naked disregard of the competitive context risks exactly that result.

Id. (citations omitted, italics in original).

Although the Court did not vacate the *UNE Remand Order* or the FCC rules addressed in this case, the Court's decision, and reasoning, clearly calls into serious question any unbundling requirement for packet switching and other advanced services. The attractiveness of the advanced services market, coupled with continually improving technology, has already resulted in multiple broadband services to the home and office. As the Court noted, ILEC advanced services, such as DSL, compete with cable operators' cable modem services as well as fixed wireless and satellite broadband in a marketplace that the FCC has found to be competitive. *Id.*, at 10. Under the Court's reasoning, the competitive nature of this market means that any requests for additional unbundled network elements do not meet the "impair" standard of Section 251(d)(2). The FCC must now reexamine its unbundling rules and fashion new rules consistent with the Court's requirements.

Until the FCC acts, the Department should not proceed further with this case. The FCC did not require the general unbundling of packet switching in the *UNE Remand Order*, and the D.C. Circuit

has specifically rejected even the conditional unbundling obligation adopted in that Order. The Department should not determine terms relating to packet switching unbundling where no such obligation exists today – because the FCC's conditions for unbundling have not been met in Massachusetts[5] – and no obligation may arise in the future once the FCC acts in response to the D.C. Circuit's remand. To forge ahead in these circumstances will be wasteful of the Department's and parties' resources. It would also not be helpful in clarifying any right or obligation of Verizon MA or CLECs; the FCC will determine the scope of the unbundling requirement consistent with the direction provided by the D.C. Circuit.

2. Should the Department proceed with its investigation or wait for the FCC to address packet switching in its Triennial Review?

As discussed above, the Department should not proceed with this case until the FCC responds to the D.C. Circuit's remand, whether it does so in the Triennial Review or in a second UNE Remand proceeding.

3. If the Department proceeds, what is the appropriate standard of review and analysis required?

If the Department wishes to proceed with this case, the Department should not take any further evidence or briefs but can decide the case as presented by the parties. As noted above, the Department has used the FCC's rules as the governing principles in this case, starting with its recognition that Verizon MA had no legal obligation to provide unbundled packet switching unless the FCC's conditions set forth in 47 CFR § 51.319(c) (3)(B) were satisfied or the FCC modified its rules.

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[5] Even if the FCC's conditions were to apply to Verizon MA's first-office application of DSL service announced in February 2002, it would not be subject to the FCC's narrow unbundling exception because all of those FCC requirements would not be met. For example, Verizon MA provides for line and station transfers, which give CLECs access to available spare copper loops capable of supporting xDSL services. Verizon MA also provides access to distribution subloops under a tariff which includes collocation and

The parties presented their cases based on the existing rules, and although the D.C. Circuit requires the FCC to re-examine those rules, it did not vacate them.[6] The parties also addressed the legal, technical, and operational issues associated with the "plug and play" form of unbundling.

Verizon MA's position throughout this case has been that, because there was considerable uncertainty concerning the final policies the FCC would adopt for advanced services, which were being considered in several proceedings, the Department should await those developments before proceeding further in the case. *See e.g.*, Verizon Initial Brief, at 3; Verizon Reply Brief, at 2. The D.C. Circuit's ruling underscores the considerable uncertainty that exists. Verizon MA also showed that the "plug and play" notion is not lawful, is not technically or operationally feasible, and is not required by FCC rules. *See* Verizon Initial Brief, at 2-3, 8-32; Verizon Reply Brief, at 1-4. The standard of review and required analysis for resolving the issues in the case are technically no different today than they were before the Court's decision.

4. Is the current record in this proceeding sufficient to support the type of analysis now required under the "impair" standard? If not, what is the scope of the evidence that must be developed?

The record in this case is not sufficient to support the type of analysis that the D.C. Circuit found necessary to support regulatory imposition of unbundling requirements under the Act. Consideration of the "impairment" standard under Section 251(d)(2) was not specifically addressed in this case because, as noted above, the Department was principally seeking to examine the existing FCC conditions in 47 CFR § 51.319(c) (3)(B) relating to the unbundling of packet switching and Covad's "plug and play"

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other access arrangements.

[6] However, the D.C. Circuit did remand and vacate the line sharing rules. As a result, there is no legal basis to expand the line sharing requirement to new forms of line sharing such as through remote terminals.

concept. In short, the Department was not attempting to determine whether unbundling would be mandated apart from the FCC rules.

If the Department decides to proceed with this case, it should not take any evidence on the impairment standard. The fact is that state commissions have no authority independently to determine whether packet switching should be unbundled. The Act requires the FCC to determine ILEC unbundling obligations in the first instance, and state commissions are not free to mandate unbundling beyond that ordered by the FCC. The availability of UNEs must be limited to those instances where CLECs cannot enter the local market without them. State action making UNEs more broadly available would frustrate achievement of the Act's core goal of promoting facilities-based competition. Moreover, as the FCC has emphasized, its "policy and regulatory framework" should "foster investment and innovation …by limiting regulatory uncertainty and unnecessary or unduly burdensome regulatory costs." Broadband NPRM[7] ¶ 5. A second tier of state unbundling regulation cannot be reconciled with these critical objectives.

Section 251(d)(2) is the beginning and end of the inquiry as to the states' authority to add or retain UNEs: "[i]n determining what network elements should be made available … *the Commission shall*" engage in the impairment analysis. This is not merely an advisory role. In contrast to other parts of Sections 251 and 252,[8] where Congress gave the states a role in implementing the Act, Congress conferred upon the FCC the authority to determine what elements must be unbundled. The states cannot "reverse preempt" the FCC's determinations by considering access to unbundled elements

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[7] Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, FCC 02-42, rel. Feb. 15, 2002 ("Broadband NPRM").

[8] *See* 47 U.S.C. §§ 251(f) (states determine whether ILEC's rural exemption should be terminated), 252(b) (states arbitrate interconnection agreements), 252(d) (states determine rates for interconnection, UNEs).

where the FCC has considered access to the same elements, as is the case of packet switching. Any state action to consider independently issues addressed by the FCC would ignore the Supreme Court's mandate that the FCC impose "limits" on access to UNEs. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 392 (1999). A federal limit that can be superseded by the states is no limit at all.

Section 251(d)(3) reinforces this analysis. That provision actually restricts the states' authority by prohibiting them from establishing access and interconnection regulations unless such regulations would be "consistent with the requirements of [§ 251]" and would not "substantially prevent implementation of [§ 251] and the purposes of this part." Where the FCC has acted, any state unbundling mandate is inherently inconsistent with § 251. As an initial matter, this is true because the FCC has sole authority to determine what elements are to be unbundled. Moreover, even if the FCC's authority were not exclusive, if it has made a non-impairment finding with respect to a particular UNE (or has found impairment but has declined to mandate unbundling under the Act due to other considerations), then any state action to mandate access to that UNE would likewise be inconsistent with Section 251. Similarly, where the FCC has mandated unbundling but that decision has been found to be flawed, as is the situation that now exists with respect to the FCC's *UNE Remand Order*, any state action also would be inconsistent with Section 251.

Even if the Department could order unbundling above and beyond that mandated by the FCC, its unbundling authority would be limited to the impairment standard mandated by Section 251(d)(2) and defined by FCC rules. The current federal framework governing unbundling—including the FCC's articulated impairment standard – has been rejected by the D.C. Circuit's decision in *U.S. Telecom* as inconsistent with the Act. Should the D.C. Circuit's decision stand – as Verizon MA expects it will—

there will be no new impairment standard for the Department to apply until the FCC issues new unbundling rules in accordance with the requirements of the D.C. Circuit's decision.

Finally, even if the Department could independently develop and apply its own impairment analysis under Section 251(d)(2) absent FCC guidance, the record in this case is, as noted above, insufficient on which to conduct such an analysis. The Department never conducted, and the parties did not introduce evidence expressly addressing, the impairment analysis required by Section 251(d)(2).

Respectfully submitted,

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By its attorney,

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